No. 72

JUN 13 1955

In the Supreme Court of the United States

OCTOBER TERM, 1955

FRANK COSTELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	4
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	7
Conclusion	21

CITATIONS

Cases:

Abrams v. *United States*, 250 U.S. 616 20

Banks v. *United States*, 204 F. 2d 666, certiorari denied, 346 U.S. 857, order vacated, 347 U.S. 1007, judgment vacated and case remanded, 348 U.S. 905 ..... 8, 9, 10

Brady v. *United States*, 24 F. 2d 405 ..... 7, 12

Campodonico v. *United States*, decided April 27, 1955 17

Duarte v. *United States*, 171 F. 2d 971 12

Ford v. *United States*, 210 F. 2d 313 13

Glasser v. *United States*, 315 U.S. 60 20

Gorin v. *United States*, 312 U.S. 19 20

Holland v. *United States*, 348 U.S. 121 ..... 13, 14, 16, 19

Johnson v. *United States*, 221 Fed. 250 11

Lutwak v. *United States*, 344 U.S. 604 11

Mortensen v. *United States*, 322 U.S. 369 20

Nanfito v. *United States*, 20 F. 2d 376 ..... 7, 11

Pierce v. *United States*, 252 U.S. 239 20

United States v. *Adonis*, decided March 28, 1955 17

United States v. *Calderon*, 348 U.S. 160 16

United States v. *Feinberg*, 140 F. 2d 592 20

United States v. *Johnson*, 123 F. 2d 111, reversed, 319 U.S. 503 14

United States v. *Johnson*, 319 U.S. 503 8

Warszower v. *United States*, 312 U.S. 342 14

Statutes:

Internal Revenue Code of 1939, Sec. 145(b) (26 U.S.C. 1952 ed., Sec. 145) 2

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OPINION BELOW

The majority and concurring opinions of the Court of Appeals (Pet. 27-50) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals (Pet. 51-52) was entered on April 5, 1955, and a petition for rehearing was denied on April 14, 1955. The petition for a writ of certiorari was filed on May

12, 1955. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment should have been dismissed because it was based upon "hearsay" testimony of Government revenue agents.

2. Whether the trial court abused its discretion in refusing to admit evidence that the Government had made income tax assessments for civil purposes, alleging unreported income for the years 1941-1945 in excess of that proved at the trial.

3. Whether the evidence was sufficient to establish (a) a solid starting point for the net worth-expenditures computations, and (b) that the excess expenditures arose from current taxable income.

4. Whether the jury was properly charged as to reasonable doubt, and whether the Court of Appeals applied the proper standards as to quantum of proof upon appellate review of sufficiency of the evidence.

5. Whether the Court of Appeals was required to grant a new trial as to the years 1948 and 1949 because it reversed the conviction for 1947.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.* Any

person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(26 U. S. C. 1952 ed., Sec. 145.)

STATEMENT

On March 11, 1953, petitioner was indicted in the United States District Court for the Southern District of New York on charges of willfully attempting to evade large parts of his income taxes for the years 1946 through 1949 by filing fraudulent returns, in violation of Section 145(b) of the Internal Revenue Code of 1939. (R. 1a, 9a-12a.) After a jury trial petitioner was found not guilty on Count One (involving 1946) and guilty on the remaining counts. (R. 1872a.) On May 17, 1954, he was fined $10,000 on each count and sentenced to imprisonment for five years on each count, the terms to run concurrently. (R. 1875a, 1886a.)

The evidence to support the verdict may be summarized as follows: By the testimony of 150 wit-

losses and the use of 308 exhibits the Government reconstructed the net worth and expenditures of petitioner and his wife from the starting point (October 18, 1937) through the prosecution years. It was proved that petitioner's true net income and tax for the prosecution years, reconstructed on the net worth-expenditures method, as compared with the amounts reported on his income tax returns, were as follows (R. 9a-12a, 1594a-1595a, Govt. Ex. 364, Ex. Vol. p. 53):[2]

Year	Reported[2]	Corrected	Unreported
	Net Income		
1946	$23,673.90	$ 25,214.67	$ 1,540.77
1947	17,307.23	54,045.70	36,738.47
1948	12,325.30	47,570.37	35,245.07
1949	22,410.70	54,957.06	32,546.36
Totals	$75,417.13	$181,787.80	$106,070.67
	Income tax		
1946	$ 8,338.72	$ 9,482.58	$ 1,143.86
1947	5,085.91	27,649.07	22,563.13
1948	2,153.48	15,939.50	13,786.02
1949	4,910.91	19,657.38	14,746.41
Totals	$20,489.08	$72,728.53	$52,239.45

The investigation conducted by the Treasury agents included a search of all land records in eight counties of the New York area, the checking of 88 banks for accounts and loans, the checking of 78 brokerage houses and fifteen insurance companies in the New York area, and the checking of

[1] The printed record in the Court of Appeals is comprised of three volumes of testimony consecutively paginated and a fourth volume (here referred to as "Ex. Vol.") containing the exhibits, which is separately paginated.

[2] The reported income figures shown in the petition (p. 6) represent gross income.

banks in New Orleans, Louisiana, Hot Springs, Arkansas, and Hollywood, Florida. (R. 1382a-1389a.) Petitioner's sources of taxable income, according to his returns, included salaries from two business ventures, leasehold and interest income, miscellaneous income (which represented gambling gains), and a fee of $15,000 per year (compensation for his services in keeping bookmakers away from a certain race track). (R. 1035a-1037a, 1040a-1041a, 1080a-1081a, 1180a-1181a, Govt. Ex. 363(f), Ex. Vol. p. 52.) There was a careful search by the agents for evidence of the receipt of non-taxable, as well as taxable funds. This disclosed a small inheritance received by Mrs. Costello in 1945, and the receipt by petitioner of proceeds of life insurance policies, dividends on insurance policies, and income tax refunds, all of which were duly allowed in the Government's computations. (R. 1388a-1389a, 1394a, Govt. Ex. 362(d), Ex. Vol. p. 40 and Govt. Ex. 363(e), Ex. Vol. p. 51.)

The net worth starting point was October 18, 1937. On that date petitioner stated to Treasury agents under oath (Govt. Ex. 23, Ex. Vol. pp. 1-10) that he was a professional gambler; that he had between $25,000 and $30,000 of cash on hand; that he owned his home, an automobile, an interest in a slot machine enterprise in New Orleans, and about $5,000 in receivables; and that he had no other assets. The investigation confirmed these admissions and, in addition, unearthed a bank account in the name of petitioner's wife having a

balance of $1,154.31. (Govt. Ex. 362, Ex. Vol. p. 33.) The Government's proof established that between the starting point and December 31, 1945 (the beginning of the first year covered by the indictment), the increases in the visible net worth of petitioner and his wife plus their non-deductible expenditures (after adjustment for non-income funds received) were $202,865.81, in excess of reported income. (R. 1456a-1463a, Govt. Exs. 362-362(e), Ex. Vol. pp. 33-41.) The Government's determination of petitioner's net worth as of December 31, 1945, included no cash except the $29,506.71 which he and his wife had on deposit at that time. (Govt. Ex. 363, Ex. Vol. p. 42.)

To support further the validity of the net worth starting point, the prosecution introduced evidence showing that until 1947 petitioner was far in arrears in his federal income tax payments; that he frequently borrowed money against his life insurance policies; that there were three old judgments outstanding against him until late in 1943; that a car was bought by petitioner's wife in 1941 on the installment plan and their home was bought in 1944 subject to a $12,000 mortgage; and that he borrowed money at 4% interest from one Erickson in 1946 and 1947 and made partial repayments in 1948. (R. 585a-587a, 649a-651a, 782a-785a, 859a-860a, 998a-999a, 1002a-1003a, 1009a-1013a, 1039a-1040a, 1090a-1092a, 1111a-1112a, 1583a.)

There was ample evidence of willfulness in addition to the size and consistency of the understate-

ments of income. It was shown that some of petitioner's transactions were made in fictitious names or the names of nominees (R. 340a, 836a-842a, 1003a-1008a, 1295a-1297a), and that, while the bulk of his comparatively small expenditures was paid for by check, most of the larger investments were paid for in currency (R. 303a-307a, 318a, 587a, 595a-597a, 923a, 989a-994a, 1004a-1007a, 1010a, 1015a-1018a).

Petitioner did not testify and the defense introduced only one witness, an expert accountant, who attempted to show (R. 1674a-1685a) that the excess expenditures arose from cash on hand at the beginning of the period.

ARGUMENT

1. Asserting a conflict on this point with the decisions of the Eighth Circuit in *Nanfito v. United States*, 20 F. 2d 376, and *Brady v. United States*, 24 F. 2d 405, petitioner contends (Pet. 9-12) that the indictment should have been dismissed because it was based upon hearsay evidence in that the only witnesses at the trial who had also testified before the grand jury were three Treasury agents. Concededly, those cases declare that an indict-

Petitioner's pre-trial motion to inspect the grand jury minutes was denied (R. 85a-86a), as was his motion to dismiss the indictment, made at the close of the Government's case (R. 1651a) and at the close of all the evidence (R. 1782a-1783a). At the trial petitioner, by cross-examination, of all the Government's witnesses, developed the fact that none of them had testified before the grand jury except the three Treasury agents. (Pet. 41 R. 1397a-1575a, 1597a.)

ment based solely on "incompetent" evidence is invalid, while in this case Judge Learned Hand's opinion for the court below states, in general terms, that it is immaterial that only hearsay was produced before the grand jury.

However, the sweep of the opinion below is far broader than the facts of this case require. For here the evidence presented to the grand jury was testimony which would be competent and admissible at the trial. The evidence before the grand jury, though it could be characterized as "hearsay", was the testimony of the Government revenue agents, summarizing the results of their investigations. Their computations regarding petitioner's income, expenditures, etc., were competent and admissible at the trial, as this Court held in *United States v. Johnson*, 319 U. S. 503, 519; and, indeed, these witnesses later testified at the trial of this case.

It appears, therefore, that the precise issue here is not the broad one considered and discussed in the opinion below, but rather the more narrow question whether an indictment for tax evasion is vitiated by the fact that the grand jury acted solely on the basis of the testimony of Government revenue agents. And, on that issue, not only is there no conflict between the Second and Eighth Circuits; there is in fact a complete accord of views, as shown by the decision of the latter court in *Banks v. United States*, 204 F. 2d 666.[1]

[1] Certiorari denied, 346 U. S. 857, order vacated, 347 U. S. 1007, judgment vacated and case remanded, 348 U. S. 905.

In *Banks* v. *United States*, *supra*—like this case, a conviction for tax evasion proved by the net worth method—the appellant urged as a basis for dismissing the indictment that the only witness who had appeared before the grand jury was the special agent who had investigated the case, and that the entire presentation had required only an hour and a quarter. He argued (204 F. 2d at 668), like the petitioner here, that there was no competent evidence to support the indictment. Rejecting the claim that the indictment should have been dismissed, the Eighth Circuit said (*id.* at 669-670):

> It developed that the special agent referred to was George H. McKusick who testified at the trial and whose testimony for the government is reviewed above. He testified as to the method adopted, that is the net worth method, and the findings of the investigators. Reviewing that evidence indicates that not more than an hour or at most an hour and a half would be necessary to place it before a grand jury or a petit jury in case no time was consumed by counsel's objections and arguments to the court on admissibility. The evidence was admissible not only before the grand jury but also upon the trial. We do not think the judges abused their discretion in denying the motion.
>
> Further a trial court's exercise of discretion in denying a motion to quash or dismiss an indictment because of irregularity, if any, in grand jury proceedings is not ordinarily re-

viewable. *United States* v. *Holmes*, 3 Cir., 168 F. 2d 888. * * *

On their facts, *Banks* and the instant case are indistinguishable. Here, as there, the evidence before the grand jury was the testimony of Treasury agents who had made the investigation (R. 1397a, 1575a, 1597a). In both cases, these same agents testified at the trial as to the nature of the net worth method, the manner in which it was applied, and the results of their investigation—*i. e.*, net worth increases substantially in excess of reported income (R. 1382a-1394a, 1428a-1488a, 1581a-1596a). Both appellants contended that the indictment must be dismissed for lack of competent evidence, and both courts held that the testimony of the Treasury agents was sufficient to sustain the indictment. True, the Eighth Circuit characterized such testimony as being "admissible not only before the grand jury but also upon the trial." But it is equally true that similar testimony was admissible, and admitted, at the trial of the instant case (R. 1382a-1394a, 1428 1488a, 1581a-1596a). Thus, Judge Hand's concession (Pet. 41) that the evidence before the grand jury was "hearsay" can only mean that it was not preceded (as it later was at the trial) by a train of witnesses to testify to specific transactions or authenticate documentary evidence brought together by the Treasury investigators and presented by them to the grand jury. This, obviously, was equally the situation in *Banks*, and the identity in result remains clear whether the rationale be that the agent's testimony

was "admissible" or that it was sufficient though "hearsay." The important point is that both courts have upheld indictments for tax evasion where the massive details of the net worth evidence were collected by Treasury agents and presented by them to the grand jury.

Against this harmony in concrete result, the asserted conflict becomes unimportant, particularly since neither of petitioner's Eighth Circuit cases involves the problem of hearsay before a grand jury and only one of them actually holds that an indictment cannot rest solely upon evidence that would for some reason be "incompetent" at the trial. That one case, *Nanfito* v. *United States*, 20 F. 2d 376, held that the trial court had erred in rejecting an offer to prove that the only witness before the grand jury was the wife of a person indicted. Applying the rule that a wife would not be competent to testify against her husband (*Lutwak* v. *United States*, 344 U.S. 604, 613; *Johnson* v. *United States*, 221 Fed. 250, 251 (C.A. 8th)), the court stated (20 F. 2d at 378):

> A grand jury, in the course of its inquisitorial duties, should be permitted to accuse and indict all persons who have violated the laws when sufficient evidence is presented to them *by competent witnesses*. [Emphasis added.]

Though this conclusion fits under the sweeping rubric that "incompetent" evidence is insufficient for an indictment, the dissimilar problem of incompetent witnesses is obviously less pertinent to the

instant case than the Eighth Circuit's decision in the indistinguishable circumstances of *Banks*.

As for the second case urged as showing a conflict with the Eighth Circuit, *Brady* v. *United States*, 24 F. 2d 405, the holding there was only that an indictment could not stand where there was no evidence whatsoever to sustain it. See 24 F. 2d at 408. Here, of course, the argument goes not to a lack of any evidence—or, in other words, a lack of reasonable basis for the grand jury's action—but only to the nature and quality of the evidence. Again, the close similarity of *Banks* is far more impressive than the divergence in dicta.[5]

2. Petitioner contends (Pet. 12-14) that the trial court erred in refusing to receive evidence that the Government had made income tax assessments against him for civil purposes alleging unreported income for the five years prior to those covered in the indictment of some $90,000 in excess of that proved at the trial. But there is no basis for the assumption underlying this argument—that if the civil assessment was correct, he could have had an additional $90,000 available to him as of the begin-

[5] The only other court of appeals decision relied upon by petitioner, *Duarte* v. *United States*, 171 F. 2d 971 (C.A. 5th), affirmed a conviction and merely observed that the appellant "was entitled to show, if he could, that the indictment was not based upon evidence" (p. 972). This dictum, and the similar reference to the appellant's "substantial right to prove that there was no testimony before the grand jury" (*ibid.*), is like *Brady* v. *United States*, *supra*, and likewise fails to show the conflict petitioner asserts.

ning of 1946 which, if it was in the form of currency, was not taken into account in the criminal case. For the uncontradicted testimony showed that the civil assessments, like the criminal case, were constructed on the net worth-expenditures method, and that none of the $90,000 could have been available at the beginning of 1946, having been expended prior to that time. (R. 1515a-1518a, 1522a-1530a.)[6] In other words, being based solely upon expenditures and discovered acquisitions, the civil assessments could not have reflected accumulated resources omitted from the computations. Accordingly, the civil assessments had no relevance to the criminal case and were properly excluded. The case of *Ford* v. *United States*, 210 F. 2d 313, 319 (C.A. 5th), is clearly distinguishable on its facts, for there the excluded evidence was relevant "to show cash funds available for expenditures." Here the evidence was irrelevant; the funds had already been used for past expenditures, and could not have been available for future spending.

3. Equally unsubstantial is petitioner's claim (Pet. 14-20) that in the light of the principles of *Holland* v. *United States*, 348 U.S. 121, carefully considered and applied by the court below (Pet. 28-35, 39-40), the evidence was insufficient to estab-

[6] Petitioner's argument (Pet. 7-8) that this testimony was only "an opinion not based on personal knowledge" has no support in the record. Agent Leath's testimony was unequivocal and unchallenged, and since he was in charge of the investigation (R. 1328a) he must have had personal knowledge

itself (a) the net worth starting point and (b) that the excess expenditures arose from current taxable income.

a. The petitioner's net worth on October 18, 1937, was firmly based on his own sworn admissions to the Treasury Department (Govt. Ex. 23, Ex. Vol. p. 3), admissions *ante litem motam* which require no corroboration. *Warszower* v. *United States*, 312 U.S. 342, 347. The Government's proof painstakingly reconstructed his financial history from that date to December 31, 1945, the beginning of the first prosecution year, demonstrating that the visible net worth increases and expenditures of petitioner and his wife during that period exceeded their reported income by $202,865.81. (R. 1456a-1463a; Govt. Exs. 362-362(e), Ex. Vol. pp. 33-41.) This alone was evidence that he had no substantial amount of cash on hand at the end of 1945. *United States* v. *Johnson*, 123 F. 2d 111 (C.A. 7th), reversed on other grounds, 319 U.S. 503. In addition, there was proof that for many years prior to 1947 petitioner was far behind in his income tax payments; that he borrowed against life insurance policies and from business associates, paying interest; and that there were three judgments outstanding against him for many years until he finally paid them in 1943 (*supra*, p. 6).

While he does not question directly the sufficiency of such evidence to refute the theory of an accumulated cash hoard as accounting for visible net worth increases (cf. *Holland* v. *United States*, *supra*), petitioner urges reversal (Pet. 14-15) on the

ground that his acquittal for 1946 and the reversal below of his conviction on Count II (for 1947) reflected a failure of proof that currency on hand did not account for the excess of increases and expenditures over income in those years. It is contended that the same explanation might apply to 1948 and 1949 and that, having reversed for 1947, the court below was required to reverse for the later years as well. But the fallacy here is obvious. While, if it mattered, we would question the correctness even of upsetting the jury's verdict for 1947,[7] it is clear that, assuming this was proper, it cannot impair the validity of petitioner's conviction for 1948 and 1949. Giving petitioner the benefit of a highly speculative doubt, the court below found he might have had currency on hand sufficient to absorb the 1947 increases. The analysis (Pet. 34) showing that this possibility could not reach to 1948 and 1949 decisively answers the contention that the jury's verdict for these years

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[7] As we have pointed out (*supra*, pp. 4-6), the Government's evidence amply negated the existence of any large cash hoard at the beginning of 1947 or any other year. The Government's computations did not list cash on hand at the beginning or end of any indictment year, and there was no reason to believe that petitioner had a cash reserve at the beginning of 1947 larger than at the end of 1947—the only circumstance which could have impaired the validity of the computations for that year. There was no evidence that petitioner had claimed any cash on hand during the investigation, and the attempts of his expert witness to establish such an explanation at the trial were thoroughly discredited. (R. 1699a-1741a.) On this evidence, it would seem that the jury's verdict of guilty for 1947 was amply justified.

could not stand. *Cf. United States v. Calderon*, 348 U.S. 160, 168.

Similarly without force is the suggestion (Pet. 16) that petitioner's wife might have had cash or other property which was not taken into account. To refute this possibility the evidence showed (1) that intensive investigation had failed to disclose any assets of the wife other than those included in the computations (R. 1382a-1389a, 1394a, 1428a-1430a, 1455a); (2) her failure to file income tax returns before 1937 (R. 1583a); (3) petitioner's own statement in 1937 that his wife had no income and was dependent upon him (Govt. Ex. 23, Ex. Vol. pp. 2-3); (4) his statement in 1939 that his wife's only bank account was a housekeeping account, and that he gave her whatever money she deposited (Govt. Ex. 30, Ex. Vol. p. 27); and (5) her statement in a life insurance application in 1940 that she derived her support from petitioner (R. 774a-775a). Against this proof there was no evidence to suggest that the wife actually had undiscovered assets of her own, but only the argument that this could possibly have been the case. The recent net worth decisions of this Court make clear the inadequacy of such speculation to impair the concurrent findings of a jury and two courts that no such fact existed.

b. The argument (Pet. 16-19) that there was insufficient proof of a source of unreported income rests upon a misreading of *Holland v. United States*, *supra*, and upon neglect of the evidence in this record. In *Holland* (see 348 U.S. at 137-

138), this Court pointed out that proof of a "likely source" of taxable income was sufficient. Here, the Government not only affirmatively excluded the likelihood of gifts or inheritances, but proved a likely source of income in petitioner's gambling activities. In 1948 and 1949 he reported "Miscellaneous Income" of $9,500 and $16,300, respectively, which he told his attorney represented income from wagers. (R. 1080a-1084a, 1180a-1181a, Govt. Ex. 363(f), Ex. Vol. p. 52.) There were no books or records to substantiate these figures, which petitioner merely read to his attorney from a slip of paper. (R. 1040a-1041a.) Moreover, petitioner was plainly a man of "powerful undisclosed influence" (Pet. 31), as evidenced by his receipt of $15,000 per year for keeping bookmakers away from Roosevelt Raceway (R. 1035a-1037a). Given the proof that the funds in question could not have come from nontaxable sources (see Pet. 31) or from a prior accumulation, the jury was plainly entitled to infer that they represented current taxable income. *Campodonico* v. *United States* (C.A. 9th), decided April 27, 1955 (1955 C.C.H., par. 9416); *United States* v. *Adonis* (C.A. 3d), decided March 28, 1955 (1955 C.C.H., par. 9310).[8]

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[8] "[W]here relevant leads are not forthcoming, the Government is not required to negate every possible source of nontaxable income, a matter peculiarly within the knowledge of the defendant." *See Rossi* v. *United States*, 289 U.S. 89, 91-92; 348 U.S. at 138.

[9] Petitioner adds to his discussion of the evidence a complaint (Pet. 19-20) that the trial court should have given his

4. Petitioner contends next (Pet. 20-22) that the jury was not properly instructed that each element of the offense must be established beyond a reasonable doubt and that the Court of Appeals applied an improper standard for the necessary quantum of proof in reviewing the evidence. Both arguments are without merit.

Petitioner requested two instructions (R. 1839a) somewhat similar to the one now suggested to the effect that "each element of the offense must be established beyond a reasonable doubt" (Pet. 20), but he did not object to the trial court's failure to give them (R. 1862a-1864a) nor did he argue in the Court of Appeals that they should have been

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requested instruction (R. 1843a) that none of his wife's expenditures could be considered in determining his income unless the jury was "satisfied beyond a reasonable doubt that the expenditure was made with money Mr. Costello had received as taxable income during the year in which the money was spent by Mrs. Costello." However, the court did charge the jury as follows (R. 1856a):

> None of the alleged excess investments and expenditures made by the Costellos during any year shall be considered in determining the taxable income of the defendant Frank Costello in any year unless you find that there was an excess of expenditures and investments, and that it constituted money which the defendant received as taxable income during the year in which the money was spent.

Insofar as the request was proper, the foregoing instruction granted it; and the departure of the instruction given from the one proposed was wholly correct because the proposal was in part erroneous. It was unnecessary for the Government to show, as the omitted portion of the requested instruction would have required, that each particular expenditure came from funds received during the same year, obviously an impossible and pointless task. All the Government had to prove in this respect was that the sum of the net worth increase and expenditures for each year substantially exceeded the income reported

given.[10] At any rate, the jury was told five separate times in the charge (R. 1854a, 1852a, 1858a, 1860a) that in order to convict, they must be satisfied of the defendant's guilt beyond a reasonable doubt, and the meaning of reasonable doubt was carefully explained (R. 1860a-1861a). At one point the judge charged the jury as follows (R. 1852a):

> Accordingly, in order to find the defendant guilty on any count, you must be convinced beyond a reasonable doubt that all three elements were present, namely, that a tax was due in the year covered by the indictment, that the defendant attempted to evade the tax, and that he did so with a specific evil intent to effect the evasion.

The charge thus complies with the requirement that the Government must "prove every element of the offense beyond a reasonable doubt though not to a mathematical certainty" (*Holland* v. *United States*, *supra*, at 138), the language now relied upon by petitioner. If any juror had a reasonable doubt as to the existence of a tax deficiency, *or* an attempt to evade it, *or* wilfulness, he would

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on the return for that year. Once this was done, the excess, together with the other evidence to show its source in current taxable income, was sufficient to support the jury's inference that petitioner had received substantial unreported income.

[10] His argument in the Court of Appeals (Appellant's Br. 37-39) was that the jury should have been given requested instructions Nos. 16, 17 and 18 (R. 1842a-1843a), which embody language similar to that found objectionable and confusing by this Court in the *Holland* case (348 U.S. at 139-140).

necessarily have had a reasonable doubt as to petitioner's guilt under the instructions.

Disputing the view of the Court of Appeals that in reviewing the trial court's action on a motion for acquittal the standard of proof necessary to take a case to the jury is the same in criminal as in civil cases,[11] petitioner quotes a number of decisions (Pet. 21-22) in which courts have used different language to describe the scope of appellate review. But these differences in formulation leave no doubt of the point which is dispositive under this Court's decisions—that the question as to whether a reasonable doubt exists is for the jury, and that on appeal the proper test is whether there was competent and substantial evidence fairly tending to sustain the verdict. *Pierce* v. *United States*, 252 U.S. 239, 251; *Abrams* v. *United States*, 250 U.S. 616, 619; *Glasser* v. *United States*, 315 U.S. 60, 80; *Gorin* v. *United States*, 312 U.S. 19, 32; *Mortensen* v. *United States*, 322 U.S. 369, 374. It is clear that the careful appraisal of the record by the court below fully met the test.

5. Finally, petitioner substantially repeats an earlier argument, already discussed (*supra*, pp. 14-16), when he asserts (Pet. 23-25) that the re-

[11] The position of the court below is aptly summarized in *United States* v. *Feinberg*, 140 F. 2d 592, 594, where it said that appellate courts should refuse to distinguish between the evidence which should satisfy reasonable men, and the evidence which should satisfy them beyond a reasonable doubt: "While at times it may be practicable to deal with these as separate without unreal refinements, in the long run the line between them is too thin for day to day use."

versal below on Count II means there was "substantial error in the submission of the case to the jury" (Pet. 23) and requires reversal on the other counts as well. As we have shown, the factual possibility which led the Court of Appeals, out of abundant caution, to disagree with the jury on Count II does not reach to Counts III and IV. The evidence powerfully demonstrating petitioner's guilt on these counts fully justified, if it did not compel, affirmance of the jury's verdict on them.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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